

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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RE:

LEGEND

Father	=
Date 1	=
Date 2	=
Spouse	=
Decedent	=
Date 3	=
Husband	=
Child 1	=
Child 2	=
Child 3	=
Child 4	=
Child 5	=
Date 4	=
Decedent's Family Trust	=

Grandchild 1	=
Grandchild 2	=
Grandchild 3	=
Grandchild 4	=
State	=

Dear :

This letter responds to your letter, dated October 5, 2009, and subsequent correspondence, requesting rulings with respect to the federal estate and generation-skipping transfer (GST) tax consequences of the exercise of a power of appointment.

The facts and representations submitted are summarized as follows:

Father executed his last will and testament on Date 1. Father died on Date 2, a date before September 25, 1985. Pursuant to the terms of Father's will, an irrevocable trust was created for Spouse's benefit. It is represented that Spouse made no actual or constructive additions to the trust and had no powers of appointment with respect to the trust. Upon the death of Spouse, Spouse's trust was divided into separate shares for each of Father's children, including Decedent. You have requested rulings solely with respect to Decedent's share.

Article Fifth of Father's will provides that Decedent is entitled to principal in the discretion of an independent trustee. Upon the death of Decedent, the balance of Decedent's share is to be paid over to Decedent's then living issue in shares as she appoints by will, or, in default of appointment, to her issue, per stirpes.

Decedent died testate on Date 3, survived by Husband, Child 1, Child 2, Child 3, Child 4, and Child 5. Pursuant to Decedent's will, dated Date 4, Decedent exercised the power of appointment granted to her under Father's will with respect to Decedent's share (hereinafter, Father's Trust). Decedent's will further provides that the appointed property will be administered under the terms of Decedent's Family Trust, a revocable trust established by Decedent and Husband.

Article Sixth of Decedent's Family Trust provides that the assets from Father's Trust, subject to Decedent's power of appointment, will be apportioned in equal shares among Decedent's children, in further trust as follows: one equal share for each living child of Decedent and Husband and one equal share for each group composed of the living descendants of a deceased child of Decedent and Husband. Each share allocated to a living child of Decedent and Husband is to be held, administered, and distributed as a separate trust (Child's Trust) for the child's benefit as the primary beneficiary.

Section II of Article Sixth of Decedent's Family Trust provides that the trustee is to distribute all the net income and as much of the principal of the respective Child's Trust to the primary beneficiary as the trustee deems reasonably necessary for the primary beneficiary's proper health, maintenance, support and education. The primary beneficiary also has a noncumulative power to withdraw up to five percent of the trust principal each year. Upon the primary beneficiary's death, the primary beneficiary may appoint property remaining in the Child's Trust to a class of persons consisting of the descendants of Decedent and Husband. In no event, however, may the primary beneficiary exercise the power of appointment in favor of the primary beneficiary, the primary beneficiary's estate, the creditors of the primary beneficiary, or the creditors of the primary beneficiary's estate. The class of persons permitted to take under a primary beneficiary's power of appointment is further limited by Decedent's power of appointment granted to her from Father's will with respect to the descendants of Decedent living at Decedent's death. Thus, the class of persons that may take under a primary beneficiary's power of appointment consists of Child 1, Child 2, Child 3, Child 4,

Child 5, Grandchild 1, Grandchild 2, Grandchild 3, and Grandchild 4. Any unappointed balance of the Child's Trust is to be distributed to the primary beneficiary's living descendants, by right of representation. If the primary beneficiary has no living descendants, then the Child's Trust is to be distributed to the living descendants of Decedent and Husband, by right of representation.

Section IV of Article Sixth provides that, unless sooner terminated, each Child's Trust created under Article Sixth will terminate 21 years after the death of the last survivor of the descendants of Father, who were living at the date of Father's death. All principal and undistributed income will be distributed to the beneficiaries entitled to receive income payments from the trust in the same proportions that the beneficiaries are entitled to receive income at the time of termination.

Section II, paragraph G, of Article Eleventh of the Decedent's Family Trust provides that the validity, construction, administration and all rights under the trust will be governed by the laws of State in force from time to time, regardless of any change of residence of the trustee or any beneficiary or the appointment or substitution of a trustee residing or doing business in another state.

You have requested the following rulings:

1. Decedent's exercise of Decedent's power of appointment in Father's Trust in a manner that gives each of Decedent's children a power to appoint property at the child's death among Decedent's descendants living at Decedent's date of death, does not cause any of the assets of Father's Trust to be includible in Decedent's estate for estate tax purposes under § 2041(a)(3) of the Internal Revenue Code.
2. Decedent's exercise of Decedent's power of appointment in Father's Trust in a manner that gives each of Decedent's children a power to appoint property at the child's death among Decedent's descendants living at Decedent's date of death, does not cause the appointed property to lose its "grandfathered" GST exemption.

Section 2041(a)(2) provides that the value of the gross estate includes the value of all property to the extent of any property, with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive.

Section 2041(a)(3) provides that the value of the gross estate includes the value of all property to the extent of any property, with respect to which the decedent by will, or by disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under

§§ 2035, 2036, or 2037, exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

Section 2041(b)(1) provides that the term "general power of appointment" means a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. Section 2041(b)(1)(A) provides that a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Sections 20.2041-1(c)(1) of the Estate Tax Regulations provide that a power of appointment is not a general power if by its terms it is either (a) exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of his estate, or (b) expressly not exercisable in favor of the decedent or his creditors, or the decedent's estate or the creditors of his estate.

Section 20.2041-1(c)(2) provides that a power is limited by an ascertainable standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). The words "support" and "maintenance" are synonymous and their meaning is not limited to the bare necessities of life.

Section 2601 imposes a tax on every generation-skipping transfer, which is defined under § 2611 as a taxable distribution, a taxable termination, or a direct skip.

Under § 1433(a) of the Tax Reform Act of 1986 (the Act) and § 26.2601-1(a) of the Generation-Skipping Transfer Tax Regulations, the generation-skipping transfer (GST) tax is generally applicable to generation-skipping transfers made after October 22, 1986. However, under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i), the tax does not apply to any generation-skipping transfer under a trust that was irrevocable on September 25, 1985, and no addition (actual or constructive) was made to the trust after that date. This rule does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985.

Section 26.2601-1(b)(1)(v)(A) provides that, except as provided under § 26.2601-1(b)(1)(v)(B), where any portion of a trust remains in the trust after the post-September 25, 1985, release, exercise, or lapse of a power of appointment over

that portion of the trust, and the release, exercise, or lapse is treated to any extent as a taxable transfer under chapter 11 or chapter 12, the value of the entire portion of the trust subject to the power that was released, exercised, or lapsed is treated as if that portion had been withdrawn and immediately retransferred to the trust at the time of the release, exercise, or lapse. The creator of the power will be considered the transferor of the addition except to the extent that the release, exercise, or lapse of the power is treated as a taxable transfer under chapter 11 or chapter 12.

Section 26.2601-1(b)(1)(v)(B) provides a special rule for certain powers of appointment. This section provides that the release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in § 2041(b)) is not treated as an addition to a trust if -- (1) such power of appointment was created in an irrevocable trust that is not subject to chapter 13 under § 26.2601-1(b)(1); and (2) in the case of an exercise, such power of appointment is not exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years.

In the present case, Father's will limits the exercise of Decedent's power of appointment to a class consisting of Decedent's "then living issue." Accordingly, because Decedent cannot exercise any such power to or for her own benefit, her estate, her creditors, or the creditors of her estate, Decedent's testamentary power of appointment is not a general power of appointment as described in § 2041.

Ruling 1

Decedent exercised her testamentary power with respect to Father's Trust to create separate trusts for the benefit of each of her children (Child's Trust). For each Child's Trust, Decedent created a testamentary power of appointment exercisable by the primary beneficiary of the Child's Trust in favor of a class consisting of Decedent's and Husband's descendants that were living on Decedent's date of death on Date 3. This class is limited to persons other than the primary beneficiary, the primary beneficiary's estate or the creditor's of the primary beneficiary, or the creditor's of the primary beneficiary's estate.

Under the terms of each Child's Trust, the trust estate will be appointed by the primary beneficiary of the Child's Trust, or will be distributed within a period measurable from the date of creation of the original power of appointment granted to Decedent under Father's will. That is, each Child's Trust must terminate no later than 21 years after the death of the last survivor of those descendants of Father who were living at the date of death of Father. Thus, Decedent's power has not been exercised in a manner that may postpone or suspend vesting of Father's Trust corpus for a period measured from the date of creation of the power extending beyond any life in being plus 21 years.

Further, the testamentary exercise of Decedent's power of appointment under her will did not create another power which can, under State law, be exercised in a manner that postpones the vesting of any estate or interest, or suspends the absolute ownership or power of alienation of the property of any trust held under Child's Trust for a period without regard to the date of the creation of Decedent's power of appointment.

Accordingly, Decedent's exercise of Decedent's power of appointment in Father's Trust in a manner that gives each of Decedent's children a power to appoint property at the child's death among Decedent's descendants living at Decedent's date of death, does not cause any of the assets of Father's Trust to be includible in Decedent's estate for estate tax purposes under § 2041(a)(3).

Ruling 2

Father's Trust was created under Father's will effective on Father's date of death on Date 2, a date before September 25, 1985. Thus, Father's Trust is exempt from GST tax because Father's Trust was irrevocable on or before September 25, 1985, and because no additions, either actual or constructive, were made to Father's Trust after that date.

As discussed above, under the facts presented, Decedent's exercise of her power of appointment in Father's Trust in a manner that gives each of Decedent's children a power to appoint property at the child's death among Decedent's descendants living at the time of Decedent's date of death does not create another power which can, under State law, be exercised in a manner that postpones the vesting of any estate or interest in a Child's Trust, or suspends the absolute ownership or power of alienation of the property of a Child's Trust without regard to the date of the creation of the original power for the respective Child's Trust.

Accordingly, Decedent's exercise of Decedent's power of appointment in Father's Trust in a manner that gives each of Decedent's children a power to appoint property at the child's death among Decedent's descendants living at Decedent's date of death, does not cause the appointed property to lose its "grandfathered" GST exemption.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. The rulings in this letter pertaining to the federal estate and/or generation-skipping transfer tax apply only to the extent that the relevant sections of the Internal Revenue Code are in effect during the period at issue.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Leslie H. Finlow
Acting Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)